No. 06-1470

In the Supreme Court of the United States

TOWN OF NORWOOD, MASSACHUSETTS,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner, a wholesale municipal electricity customer, was precluded from raising additional objections to a formula for calculating a contract termination charge that both the Federal Energy Regulatory Commission and the First Circuit had sustained during a previous proceeding also initiated by petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 476 F.3d 18. The orders of the Federal Energy Regulatory Commission (Pet. App. 20a-66a, 67a-94a, 95a-111a, 112a-126a) are reported at 104 F.E.R.C. ¶ 61,030, 112 F.E.R.C. ¶ 61,099, 114 F.E.R.C. ¶ 61,187, and 115 F.E.R.C. ¶ 61,396, respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2007. The petition for a writ of certiorari was filed on May 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 201 of the Federal Power Act (FPA), 16 U.S.C. 824, gives the Federal Energy Regulatory Commission (Commission or FERC) jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). All proposed rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to ensure that they are not unjust, unreasonable, unduly discriminatory, or preferential. FPA § 205, 16 U.S.C. 824d. Complaints asserting that existing rates are unjust or unreasonable are governed by FPA § 206, 16 U.S.C. 824e. If, after a hearing on its own motion or on complaint, FERC determines that any existing rate or charge is unjust or unreasonable, it must determine and fix by order the just and reasonable rate or charge "to be thereafter observed and in force." FPA § 206(a), 16 U.S.C. 824e(a).

2. Petitioner Town of Norwood operates a municipal electric system that serves local businesses and residents. In 1983, petitioner and New England Power Company entered into a long-term requirements contract that required petitioner to purchase, and New England Power to supply, all of petitioner's wholesale power requirements at the rates set forth in New England Power's Tariff No. 1. Pet. App. 2a. The contract provided that it could be terminated by petitioner without penalty, but only upon seven years' notice. *Ibid.* In 1990, petitioner notified New England Power that it was voluntarily extending its contract through 2008. See

Town of Norwood, 87 F.E.R.C. ¶ 61,341, at 62,318 (1999).[1]

In 1996, the Commission adopted FERC Order No. 888, which directed public utilities subject to FERC jurisdiction to offer non-discriminatory, open-access transmission service.[2] To implement that directive, the Commission ordered the functional unbundling of wholesale generation and transmission services, requiring each utility to state separate rates for its wholesale generation, transmission, and ancillary services. See *New York* v. *FERC*, 535 U.S. 1, 11 (2002); see also *id.* at 19-20 (sustaining validity of Order No. 888).

New England Power made a number of regulatory filings as a result of Order No. 888. It sought Commission approval to divest its non-nuclear generating facilities. Pet. App. 3a. New England Power also proposed to offer settlements to both its affiliated and non-affiliated distributor customers that would permit those customers to terminate their requirements contracts earlier than would otherwise have been permitted, upon

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[1] In 1999, petitioner asked FERC to declare that its 1990 extension of its contract had been ineffective based on certain filing infirmities. FERC denied this request, see *Town of Norwood*, 87 F.E.R.C. ¶ 61,341 (1999), and its decision was affirmed by the First Circuit, see *Town of Norwood* v. *FERC*, 217 F.3d 24 (2000), cert. denied, 532 U.S. 993 (2001).

[2] See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540 (Order No. 888), clarified, 76 F.E.R.C. ¶ 61,009 and ¶ 61,347, order on reh'g, 62 Fed. Reg. 12,274 (1996) (Order No. 888-A), order on reh'g, 62 Fed. Reg. 64,688 (1997) (Order No. 888-B), order on reh'g, 82 F.E.R.C. ¶ 61,046 (1998) (Order No. 888-C), aff'd *sub nom. Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), aff'd *sub nom. New York* v. *FERC*, 535 U.S. 1 (2002).

payment of a contract termination charge. *Id.* at 2a.[3] Over petitioner's objections, the Commission approved both the divestiture and the settlement offers. *Id.* at 3a.[4]

Three of New England Power's affiliated customers and three of its unaffiliated customers accepted the settlement offers and paid the corresponding contract termination charges. Pet. App. 3a. Other non-affiliated customers opted to continue receiving their power requirements from New England Power at the rates specified in Tariff No. 1 through the contract-specified seven-year termination period. *Ibid.*

Petitioner, a non-affiliated customer, sought to decline both options. Instead, on March 4, 1998, it informed New England Power that it would be terminating its contract effective April 1, 1998, and that it would thereafter obtain its wholesale power from a different utility. Pet. App. 3a-4a, 131a.

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[3] The settlements offered to non-affiliated customers like petitioner were similar, though not identical, to those offered to New England Power's affiliated customers. As the court of appeals explained, New England Power offered to provide its affiliated customers with "low (but gradually escalating) 'wholesale standard offer' rates for power without the need for a contract." Pet. App. 3a. Those standard offer rates were designed to "interlock[] with schedules of *retail* standard offer rates that New England Power's affiliates ha[d] agreed, in settlements with their respective state commissions, to offer as a safeguard for retail customers who do not or cannot immediately take advantage of the competitive sources of retail supply that * * * regulators foresee developing." *Id.* at 245a-246a.

[4] See *New England Power Co.*, 78 F.E.R.C. ¶ 61,080 (1997); *New England Power Co.*, 80 F.E.R.C. ¶ 63,003 (1997); *New England Power Co.*, 81 F.E.R.C. ¶ 61,281 (1997), reh'g denied, 83 F.E.R.C. ¶ 61,265 (1998); *New England Power Co.*, 82 F.E.R.C. ¶ 61,179 (1998).

In response, on March 18, 1998, New England Power filed an amendment to Tariff No. 1 (March 18 amendment). Under the amendment, any of New England Power's remaining distributor customers—including petitioner—would have the right to terminate their requirements contracts upon 30 days' notice and payment of a specified contract termination charge (CTC). Under the tariff amendment, a distributor's CTC was to be calculated using a formula designed to enable New England Power to recover the revenues it would have collected had the terminating customer continued to pay the tariff rate through the end of the contract term, less the expected costs avoided by not providing service. See Pet. App. 4a-5a & n.4.[5] As the court of appeals noted, "[t]his CTC [formula] was in several respects less favorable than the contract termination charge applied to" customers that had accepted New England Power's initial settlement offer. *Id.* at 5a.

In proceedings before the Commission, petitioner objected to the March 18 amendment on numerous grounds and also requested a hearing on the reasonableness of its own CTC amount (which petitioner itself estimated would total $78 million). Pet. App. 5a. The Commission rejected petitioner's claims and accepted the March 18 amendment as "reasonable," *id.* at 277a-284a,[6] and on rehearing refused to conduct an eviden-

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[5] In its simplest expression, the CTC formula is $(R\text{-}M) \times L$, where R equals annual revenues under the sales contract, M equals the market value of the released power, and L equals the length of the contract term remaining after termination. The CTC was also capped so as not to exceed the terminating customer's contribution to New England Power's fixed power supply costs. See Pet. App. 4a-5a & n.4.

[6] Pet. App. 277a-284a.

tiary hearing because "no party [had] raised any issue of material fact,"[7] *id.* at 6a (brackets in original).

Petitioner then sought review in the court of appeals of the Commission's orders upholding the March 18 amendment. Pet. App. 231a-255a (*Norwood I*). In an unanimous opinion by then-Judge Boudin, the First Circuit denied the petition for review, holding, *inter alia*, that FERC's actions had not conflicted with either the "*Mobile-Sierra* doctrine,"[8] *id.* at 240a-241a, or the filed rate doctrine, *id.* at 241a-242a, and that New England Power had not acted unfairly in imposing a higher termination charge on distributers—like petitioner—that had rejected its initial settlement offer, *id.* at 243a-245a.

Finally, and most pertinent here, the court of appeals also rejected petitioner's assertion that the CTC it would be charged under the March 18 amendment—which petitioner once again estimated at $78 million—was not "just and reasonable" for purposes of the FPA. Pet. App. 242a. "[T]he termination charge," the court of appeals stressed, "is not a new or increased *rate* for supplying energy," but rather "a formula-driven charge to cover certain projected losses to New England Power caused by *not* supplying electricity after preparing to do so, calculated based on rates already approved by FERC." *Ibid.* (first emphasis added). The court of appeals acknowledged that petitioner "might well have a legitimate objection" if the charges under the formula "were miscomputed or unsupported," but it stressed that petitioner had not "explained any such objection to

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[7] Pet. App. 272a-276a.

[8] See *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 354-355 (1956), and *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956).

us" and noted that petitioner could "presumably" still file a complaint with FERC "[t]o whatever extent there was in fact a disputed issue regarding the termination charge calculation that necessitated a hearing." *Id.* at 242a-243a.[9] This Court denied certiorari. 531 U.S. 818 (2000).

Despite FERC's approval of the CTC formula set forth in the March 18 amendment, petitioner refused to make the payments due under the tariff. After a Massachusetts state court granted summary judgment in favor of New England Power in a breach of contract collection action,[10] petitioner filed the complaint that forms the basis of this petition for a writ of certiorari.

3. On December 23, 2002, petitioner filed with the Commission a 13-claim complaint against New England Power, alleging that the CTC imposed pursuant to the March 18 amendment had been unjust, unreasonable, unduly discriminatory, preferential, or otherwise unlawful. Pet. App. 117a-119a.

On July 2, 2003, FERC summarily dismissed eight of these claims on the ground that they had already been

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[9] *Norwood I* also considered and rejected various challenges to the affiliate settlement agreements and New England Power's asset sale. Pet. App. 245a-247a, 250a-255a.

[10] *New England Power Co.* v. *Town of Norwood*, No. 982650A, 2001 WL 292974 (Mass. Super. Ct. Feb. 8, 2001); *New England Power Co.* v. *Town of Norwood*, No. 982650A, 2001 WL 543172 (Mass. Super. Ct. Mar. 14, 2001). Petitioner unsuccessfully appealed this ruling through the state system, see *New England Power Co.* v. *Town of Norwood*, 797 N.E.2d 26 (Mass. App. Ct.) (Table), petition for further review denied, 799 N.E.2d 594 (Mass. 2003)(Table), and this Court denied certiorari, 541 U.S. 1073 (2004). Petitioner later sought relief from that judgment, which was also denied. *New England Power Co.* v. *Town of Norwood*, 847 N.E.2d 366 (Mass. App. Ct.), petition for further review denied, 850 N.E.2d 584 (Mass. 2006) (Table).

"conclusively adjudicated" by the Commission and the courts. Pet. App. 121a-123a. The Commission set the remaining five claims for hearing, concluding that they at least facially related to the implementation and calculation of the CTC formula rather than the validity of the CTC formula itself. *Id.* at 120a-121a.

On June 22, 2005, after a hearing before an administrative law judge, the Commission denied petitioner's complaint, finding that New England Power had correctly applied the CTC formula set forth in the March 18 amendment. Pet. App. 24a-66a.

On February 22, 2006, the Commission denied petitioner's request for rehearing. Pet. App. 92a. Much of the request, the Commission wrote, was "simply a collateral attack" (*id.* at 80a) on the First Circuit's approval of the CTC formula in *Norwood I*, and it concluded that those portions of petitioner's request that challenged the administrative law judge's application of that formula lacked merit (*id.* at 83a-85a). The Commission calculated that petitioner owed New England Power $71,881,517 in CTC payments, plus interest. *Id.* at 65a.

On June 30, 2006, the Commission denied petitioner's further request for rehearing and for a stay pending further appeal. Pet. App. 95a-111a.

4. In another unanimous opinion by now-Chief Judge Boudin, the First Circuit affirmed the Commission's orders in relevant part. Pet. App. 1a-19a.[11] "To the extent that [petitioner] purports to interpret the *language* of the CTC tariff amendment," the court of

[11] The court of appeals remanded for the limited purpose of further proceedings regarding the proper calculation of the late payment interest rate. Pet. App. 13a-19a.

appeals concluded, "its arguments are properly before us but fail on the merits." *Id.* at 8a-9a; see *ibid.* (rejecting petitioner's arguments regarding proper calculation of the "R and M values"); see also note 5, *supra* (describing formula).

"However, the main thrust of [petitioner's] position on appeal," the court of appeals continued, "[was] that the CTC formula, as FERC reads it, [was] unlawful under the statute." Pet. App. 10a. Like the Commission before it, the court of appeals declined to address petitioner's unreasonableness arguments on the merits, holding that they were precluded as a result of petitioner's initial unsuccessful challenge to the March 18 amendment.

The court of appeals began by noting that "res judicata doctrine applies to agencies when they are acting in an adjudicative capacity to resolve a controversy between two parties." Pet. App. 11a. "Here and in the prior proceeding in which [petitioner] sought rejection of the CTC tariff," it continued, "the parties are the same and, so far as [petitioner] contests the validity of the CTC formula, the subject matter is the same." *Ibid.* Specifically rejecting petitioner's argument that its decision in *Norwood I* had left open the possibility of the sort of challenges petitioner seeks to raise here, the court of appeals stressed that what it had actually left open "was the proper computation of the R and M values *according to the formula*—not new attacks on the formula itself." *Ibid.* The First Circuit acknowledged that "a rate that was once reasonable may, in light of changed circumstances, become unreasonable." *Id.* at 12a (citing *Tesoro Alaska Petroleum Co.* v. *FERC*, 234 F.3d 1286, 1290 (D.C. Cir. 2000)). But, the court of appeals continued, the CTC "is not a *rate*; it is 'a formula

driven charge . . . calculated based on rates already approved by FERC'" that "became a fixed and final contractual obligation at the time of termination," and the court of appeals saw "nothing in the statute or case law cited by [petitioner] that prevents the construction of [a] termination charge based on rates in effect as of a certain date." Pet. App. 12a (quoting *id.* at 242a). Although petitioner had been free in the original proceeding to argue "that the tariff rates to be incorporated by the CTC were unreasonably high in light of what was known then about [New England Power's] costs" or otherwise to "contest the CTC terms as unlawful," the court of appeals stressed that what petitioner "could not do was to defer some of the available attacks on the CTC formula and now raise them in court for the first time eight years later." *Id.* at 12a-13a.

Having concluded that petitioner was claim-precluded from raising further attacks on the CTC formula, the court of appeals also stated that petitioner "would not likely have prevailed even if the merits were open." Pet. App. 13a; see *id.* at 10a (similar). The reasonableness of the way in which the CTC was calculated, it stressed, "is a regulatory issue within the province of FERC and reviewed by a court only for arbitrariness," and the court stated that it saw "nothing obviously unreasonable about framing a charge for contract termination that approximates, *as of the time of termination*, projected revenues promised by the buyer less projected avoided loss for the seller." *Id.* at 13a (emphasis added).

ARGUMENT

In separately framed questions, petitioner asks this Court to grant review to consider: (1) the reasonable-

ness of the CTC imposed upon it pursuant to the March 18 amendment; and (2) the court of appeals' determination that principles of claim preclusion barred further attacks on the CTC formula. Pet. i. As the court of appeals' unanimous opinion makes plain, however, this Court could not reach the merits questions petitioner seeks to litigate without first reaching and reversing as to the claim preclusion issue. Petitioner does not allege that the court of appeals' claim preclusion holding implicates any pertinent split in lower court authority, and that court's application of preclusion principles to the particular facts of this case was entirely correct. Further review is not warranted.

1. As petitioner acknowledges (Pet. 19), the court of appeals' affirmance of the Commission's orders was based in large measure on its conclusion that petitioner was barred under principles of claim preclusion from launching further attacks on the CTC formula set forth in the March 1998 amendment.[12] Accordingly, because "this Court reviews judgments, not opinions," *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984), there would be no way for this Court to reach petitioner's attacks on either the substance of the formula or the manner in which FERC approved it (Pet. 16-19, 25-30) without first granting review and reversing with respect to the First Circuit's claim preclusion holding.

2. Petitioner does not seriously assert that the court of appeals' claim preclusion holding implicates any per-

[12] As noted earlier (pp. 8-9, *supra*), the First Circuit also rejected two arguments that petitioner raised regarding the determination of "the R and M values" under the CTC formula. Pet. App. 8a-9a. Petitioner does not appear to be renewing those claims before this Court, and, even if it were, such factbound issues would not merit this Court's review.

tinent split in lower court authority, and its arguments against that holding consist of little more than case-specific challenges that the unanimous panel rejected. Although petitioner suggests (Pet. 24) that the First Circuit's preclusion holding "stands in direct contrast to" the Ninth Circuit's decisions in *Public Utilities District No. 1* v. *FERC*, 471 F.3d 1053 (2006), petition for cert. pending, No. 06-1457 (filed May 3, 2007) (*PUD*), and *Public Utilities Commission* v. *FERC*, 474 F.3d 587 (2006), petition for cert. pending, No. 06-1454 (filed May 3, 2007) (*PUC*), neither of these decisions involved—or even discussed—any issues regarding preclusion.

Nor has the court of appeals so far departed from standard claim preclusion principles as to warrant this Court's intervention in the absence of any conflict. To the contrary, the court of appeals correctly applied settled preclusion principles. The court of appeals acknowledged the principle for which petitioner invokes *Tagg Brothers & Moorehead* v. *United States*, 280 U.S. 420, 445 (1930) (Pet. 23)—*viz.*, that "*rate orders* are not subject to the rules of res judicata" because "a rate that was once reasonable may, in light of changed circumstances, become unreasonable" (Pet. App. 12a (emphasis added)). But, as the court of appeals noted (*ibid.*), the CTC at issue in this case "is not a *rate*" that may become unreasonable over time; rather, it is a one-time *charge* that "became a fixed and final contractual obligation at the time of termination." In addition, neither FERC nor the court of appeals denied that preclusion principles do not apply in situations where a litigant's entitlement to maintain a second action has been appropriately preserved. Pet. 20. Instead, both the agency (Pet. App. 86a) and the court (*id.* at 11a) held the arguments petitioner sought to raise in the present proceed-

ings did not fall within the scope of the reservations contained in their earlier decisions. Petitioner obviously disagrees with that assessment (Pet. 20-22), but these sort of factbound determinations do not warrant this Court's review.

In any event, the court of appeals' application of preclusion principles in the circumstances of this case was both sensible and correct. As the court of appeals noted (Pet. App. 12a), petitioner could have—and thus, under standard claim preclusion principles, should have—raised any and all arguments against the CTC formula in its challenge to the March 18 amendment. Having failed to raise "some of the available attacks on the CTC formula" at the appropriate time, petitioner may not "now raise them in court for the first time eight years later." *Id.* at 13a. Indeed, as the First Circuit cogently explained, if the court were to have permitted "this kind of hide and seek litigation tactic, nothing would prevent [petitioner] from filing tomorrow a *new* section 206 attack to present *new* arguments as to why the original CTC formula was unlawful." *Ibid.*

3. Moreover, this Court's review would not be warranted even absent the court of appeals' claim preclusion holding. Two of the three Ninth Circuit decisions with which petitioner asserts the decision below conflicts (Pet. 14, 16-19) involved the reasonableness of rates under still-existing contracts.[13] But again, as the court of appeals explained, the CTC at issue in this case "is not a *rate*," but rather a "'formula driven charge . . . calculated based on rates already approved by FERC,' * * * payment of which permitted [peti-

[13] See *PUC*, 474 F.3d at 592 (noting case involved request to modify existing contracts); *PUD*, 471 F.3d at 1057 (same).

tioner] to opt out of a contract before it had run its course." Pet. App. 12a (quoting *id.* at 242a); see Pet. 14 (acknowledging that this petition for a writ of certiorari does not present "the issue whether FERC may upset existing contracts").[14] And besides a general assertion that the case involved "similar issues of FERC's responsibilities to ensure 'just and reasonable' rates that are raised in [*PUD* and *PUC*]" (Pet. 18), petitioner provides no explanation for its one-sentence claim that "there is a conflict" (Pet. 16) between the court of appeals' decision in this case and *California ex rel. Lockyer* v. *FERC*, 383 F.3d 1006 (9th Cir. 2004), cert. denied, 127 S. Ct. 2972 (2007).

In addition, petitioner's claim that the Commission "abandon[ed]" its statutory duty to set a just and reasonable charge (Pet. 25-30) is unfounded. In 1998, the Commission examined the CTC tariff amendment, carefully considered and rejected petitioner's claims that the CTC tariff formula was not just and reasonable, and ultimately found the CTC tariff formula "reasonable" under the FPA. Pet. App. 273a-276a, 282a-283a. Likewise, petitioner's claim that the CTC is not based on costs (Pet. 27-29) is also incorrect. As the Commission found, the CTC formula was designed to "recover the revenues lost over the existing seven-year notice term, less an estimate of the market value of the released capacity and energy." Pet. App. 280a. In turn, the lost revenues in the CTC tariff formula were based on New England Power's previously-approved contract rates to

[14] Nor would there be any reason to hold this petition for a writ of certiorari in abeyance were the Court to grant review in *PUC* or *PUD*, because the court of appeals' claim preclusion holding would mean that any judgment the Court might reach in those cases could have no effect on this one.

petitioner. See *ibid.* Had petitioner thought that those existing cor ct rates were unreasonable, it "could have, and sh d have, filed a complaint under [FPA] Section 206 to decrease its rates" before it terminated its contract with New England Power. *Id.* at 164a & n.129 (citing Order No. 888-A, 62 Fed. Reg. at 12,427). Petitioner did not do so. And as the court of appeals stated: "There is nothing obviously unreasonable about framing a charge for contract termination that approximates, as of the time of termination, projected revenues promised by the buyer less projected avoided loss for the seller." *Id.* at 13a.[15]

4. In a single paragraph, petitioner asserts (Pet. 30) that the sheer size of the CTC in this case and the "devastating impact" it will have on its customers independently warrant this Court's review. As the court of appeals noted, however, the size of the present award is due in large measure to the fact that petitioner has at this point "managed to defer making the full installment payments for years." Pet. App. 13a. Although petitioner "is now faced with large past-due obligations[,] * * * the obligations are ones easily foreseen, have been enlarged by delays in payment and are the product

[15] The use of cost projections in setting rates is a common practice by the Commission. See, *e.g.*, 18 C.F.R. 35.13(d)(2) (estimated costs to be submitted as "Period II" data); see also *Indiana Mun. Elec. Ass'n* v. *FERC*, 629 F.2d 480, 483 (7th Cir. 1980) ("[I]f a utility always had to adjust its [cost] projections because of actual experience * * * the Commission would be forced to return to historic cost even though Congress did not so intend."); *Indiana & Mich. Mun. Distributors* v. *FERC*, 659 F.2d 1193, 1198 (D.C. Cir. 1981) ("[T]he Commission rightly does not require that history prove the accuracy of the utilities' estimates, but rather that the utility prove that the estimates were reasonable when made.").

of [petitioner's] own choices." *Ibid.* Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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